IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5881

ROBERT EDWARD MARSHALL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 15, 1971 —Petitioner's pro se motion to correct sentence under 28 U.S.C. § 2255 filed in United States District Court for the Northern District of California in San Francisco, California.

October 15, 1971 —Order entered granting leave to proceed in forma pauperis, appointing counsel, and order to show cause issued.

December 10, 1971—Response of United States to Order to Show Cause filed.

February 3, 1972 —Order denying motion to correct sentence entered.

February 9, 1972 —Motion to reopen hearing filed.

February 16, 1972 —Notice of appeal filed.

March 15, 1972 —Record docketed in Court of Appeals.

November 15, 1972—Opinion and Judgment of the Court of Appeals for the Ninth Circuit entered.

December 13, 1972—Order amending opinion by adding footnote filed.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

Civil Case No. C 71-1985

CR-71-8-RFP

ROBERT EDWARD MARSHALL, PETITIONER

vs.

J. J. PARKER, WARDEN, RESPONDENT,
UNITED STATES OF AMERICA, REAL PARTY IN INTEREST

PETITION FOR APPLICATION OF A WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28 U.S.C. § 2255

COMES NOW, Robert Edward Marshall, petitioner above named, and hereby makes application in this Court for the issuance of a Writ of Habeas Corpus directing the Respondent to return this petitioner to this Court for vacation of sentence and commitment for examination and treatment under the Narcotic Addict Rehabilitation Act of 1966.

JURISDICTION REQUISITES

The statutory provision conferring upon this Court's jurisdiction to provide the relief herein sought is 28 U.S.C. § 2255 in that petitioner's confinement is in violation of the constitution of the United States.

PERTINENT FACTS

1. Petitioner appeared before and was sentenced by the Honorable Judge R. F. Peckham.

2. Petitioner is presently confined in the United States Penitentiary at McNeil Island, Washington.
3. Petitioner was sentenced by this Court to a ten-year term for a violation of 18 U.S.C. 2113 (a), Entering a bank with intent to commit a felony.
4. This is petitioner's first collateral attack upon his conviction.

SPECIFICATION OF ERROR

The sentencing Court erroneously denied this Petitioner unconstitutionally, an examination and treatment under Title 18 U.S.C. 4252, 4253, by denying him solely on the basis that petitioner was a prior offender. The Court erroneously sentence petitioner to Prison, contrary to the Court's findings that petitioner was an addict, and layed within the realm of Title 18 U.S.C. sec. 4251-4253: offenders addiction, or a likelihood of offender's rehabilitation through treatment.

The sentencing Court found the sole evidence of petitioner's addiction and his likelihood of rehabilitation through examinations and treatment was in the affirmative, as this Court's recommendation to the Bureau of Prisons, therefore, the Court's refusal to commit petitioner for examination and treatment under the Narcotic Addict Rehabilitation Act was error.

STATEMENT OF FACTS

Appellant was convicted of entering a bank with intent to commit a felony in violation of Title 18 2113(a). This was the results of a guilty plea. Petitioner was represented by counsel at all proceedings.

ARGUMENT

The order of events implicit in the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. § 4251-4253, called for the court to first evaluate whether the individual before it qualifies as an eligible offender.

The sole reason this Court gave for not going through with the agreement in the "plea bargaining" was that the petitioner was not an "eligible offender" in accords with Title 18 U.S.C. 4251(f)(4) which states:

> (4) an offender who has been convicted of a felony on two or more prior occasions.

But, this is contrary to the President's Advisory Commission on Narcotic and Drug Abuse.

As is stated in *Watson* v. *United States* 439 F.2d 442 (D.C. Cir. 1970):

> "It is the fourth of these exclusions which was thought, by reason of the two prior federal narcotics offenses reported in the sentencing information, to bar appellant from being a candidate for disposition under Title II. The Narcotic Addict Rehabilitation Act of 1966 had its source in the report of the President's Advisory Commission on Narcotic and Drug Abuse, redered in November, 1963, by a distinguished group of experts under the chairmanship of our beloved senior colleague, E. Barrett Prettyman. The statute envisioned in that report did not contemplate any disqualification resting upon two prior felony convictions, and it would appear from the stated purposes of the report that any such disqualification so broadly conceived would be in hopeless conflict with the findings and recommendations of the commission".

The D.C. Cir. continued by saying:

> "one who, like appellant, suffered criminal convictions on two occasions before 1966, is denied the rehabilitative possibilities of the new approach. Certainly when those two prior conviction are possible upon a mere showing by the Government of an addict in possession, we think the discrimination between the two classes of addicts is constitutionally unacceptable. As the Supreme Court has said in another, but not entirely irrelevant, context: 'Equal Protection does not require that all persons be dealt with

identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made' ".

Here all of petitioner's convictions were prior to 1966. Therefore, this ruling would hold true in this instant case at bar. In conclusion the Watson Court held:

> "Appellant was conceded to be a narcotics addict of long standing; and this is the only fact crucial to our holding. His eligibility would have been patent but for the two prior convictions * * * * *. We hold only that the two-prior-felony disqualifying exclusion of Title II, as applied to appellant on these facts, is unconstitutional under the concept of equal protection embodied in Due Process clause of the Fifth Amendment." Also see *United States* v. *Phillips*, 403 F.2d 963 (6th Cir. 1968); *United States* v. *Williams*, 442 F.2d 738 (D.C. Cir. 1970).

The question presented by Title 18 U.S.C. 4251 (b) (f) (1) as to the eligibility of a narcotic addict to be deterined by the nature of lack of violence in the committed offense, raises the question of equal protection and the constitutionality of that sub section under the *Watson* rational. The Supreme Court pointed out in *Scales* v. *United States*, 367 U.S. 203, 211 (1961):

> "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute".

CONCLUSION

For the foregoing reasons this petitioner's sentence should be vacated and be given consideration to Title II of the Narcotic Addict Rehabilition Act.

Respectfully submitted

/s/ Robert Edward Marshall—ProPer